

AMENDED IN ASSEMBLY APRIL 25, 2011

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 592

Introduced by Assembly Member Lara

February 16, 2011

An act to amend Sections 12945 and 12945.2 of the Government Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

AB 592, as amended, Lara. Employment: leave: interference.

Existing law, the Moore-Brown-Roberti Family Rights Act, makes it an unlawful employment practice for an employer, as defined, to refuse to grant a request by an eligible employee to take up to 12 workweeks of unpaid protected leave during any 12-month period (1) to bond with a child who was born to, adopted by, or placed for foster care with, the employee, (2) to care for the employee's parent, spouse, or child who has a serious health condition, as defined, or (3) because the employee is suffering from a serious health condition rendering him or her unable to perform the functions of the job.

Existing law makes it an unlawful employment practice, unless based upon a bona fide occupational qualification, for an employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions to take leave on account of pregnancy for a reasonable period of time, not to exceed 4 months and thereafter return to work. Leave under these provisions is in addition to the leave provided under the Moore-Brown-Roberti Family Rights Act.

This bill would also make it an unlawful employment practice for an employer to interfere with, or restrain the exercise or attempted exercise of, ~~any right provided~~ *the right of an employee to an employee leave*

under the above provisions. *This bill would also state that the changes made by this bill to the above provisions are declaratory of existing law.*

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 12945 of the Government Code is
2 amended to read:

3 12945. (a) In addition to the provisions that govern pregnancy,
4 childbirth, or related medical conditions in Sections 12926 and
5 12940, *each of* the following shall be an unlawful employment
6 practice, unless based upon a bona fide occupational qualification:

7 (1) For an employer to refuse to allow a female employee
8 disabled by pregnancy, childbirth, or related medical conditions
9 to take a leave for a reasonable period of time not to exceed four
10 months and thereafter return to work, as set forth in the
11 commission's regulations. The employee shall be entitled to utilize
12 any accrued vacation leave during this period of time. Reasonable
13 period of time means that period during which the female employee
14 is disabled on account of pregnancy, childbirth, or related medical
15 conditions.

16 An employer may require an employee who plans to take a leave
17 pursuant to this subdivision to give the employer reasonable notice
18 of the date the leave shall commence and the estimated duration
19 of the leave.

20 (2) (A) For an employer to refuse to provide reasonable
21 accommodation for an employee for conditions related to
22 pregnancy, childbirth, or related medical conditions, if she so
23 requests, with the advice of her health care provider.

24 (B) For an employer who has a policy, practice, or collective
25 bargaining agreement requiring or authorizing the transfer of
26 temporarily disabled employees to less strenuous or hazardous
27 positions for the duration of the disability to refuse to transfer a
28 pregnant female employee who so requests.

29 (C) For an employer to refuse to temporarily transfer a pregnant
30 female employee to a less strenuous or hazardous position for the
31 duration of her pregnancy if she so requests, with the advice of
32 her physician, where that transfer can be reasonably

accommodated. However, no employer shall be required by this section to create additional employment that the employer would not otherwise have created, nor shall the employer be required to discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job.

(3) For an employer to interfere with, or restrain the exercise or attempted exercise of, ~~any right provided to an employee under this subdivision~~ *the right of an employee to take leave pursuant to paragraph (1)*.

(b) This section shall not be construed to affect any other provision of law relating to sex discrimination or pregnancy, or in any way to diminish the coverage of pregnancy, childbirth, or medical conditions related to pregnancy or childbirth under any other provisions of this part, including subdivision (a) of Section 12940.

SEC. 2. Section 12945.2 of the Government Code is amended to read:

12945.2. (a) (1) Except as provided in subdivision (b), it shall be an unlawful employment practice for any employer, as defined in paragraph (2) of subdivision (c), to refuse to grant a request by any employee with more than 12 months of service with the employer, and who has at least 1,250 hours of service with the employer during the previous 12-month period, to take up to a total of 12 workweeks in any 12-month period for family care and medical leave. Family care and medical leave requested pursuant to this subdivision shall not be deemed to have been granted unless the employer provides the employee, upon granting the leave request, a guarantee of employment in the same or a comparable position upon the termination of the leave. The commission shall adopt a regulation specifying the elements of a reasonable request.

(2) It shall also be unlawful employment practice for an employer to interfere with, or restrain the exercise or attempted exercise of, the right of an employee to request leave pursuant to paragraph (1).

(b) Notwithstanding subdivision (a), it shall not be an unlawful employment practice for an employer to refuse to grant a request for family care and medical leave by an employee if the employer employs less than 50 employees within 75 miles of the worksite where that employee is employed.

1 (c) For purposes of this section:

2 (1) “Child” means a biological, adopted, or foster child, a
3 stepchild, a legal ward, or a child of a person standing in loco
4 parentis who is either of the following:

5 (A) Under 18 years of age.

6 (B) An adult dependent child.

7 (2) “Employer” means either of the following:

8 (A) Any person who directly employs 50 or more persons to
9 perform services for a wage or salary.

10 (B) The state, and any political or civil subdivision of the state
11 and cities.

12 (3) “Family care and medical leave” means any of the following:

13 (A) Leave for reason of the birth of a child of the employee, the
14 placement of a child with an employee in connection with the
15 adoption or foster care of the child by the employee, or the serious
16 health condition of a child of the employee.

17 (B) Leave to care for a parent or a spouse who has a serious
18 health condition.

19 (C) Leave because of an employee’s own serious health
20 condition that makes the employee unable to perform the functions
21 of the position of that employee, except for leave taken for
22 disability on account of pregnancy, childbirth, or related medical
23 conditions.

24 (4) “Employment in the same or a comparable position” means
25 employment in a position that has the same or similar duties and
26 pay that can be performed at the same or similar geographic
27 location as the position held prior to the leave.

28 (5) “FMLA” means the federal Family and Medical Leave Act
29 of 1993 (P.L. 103-3).

30 (6) “Health care provider” means any of the following:

31 (A) An individual holding either a physician’s and surgeon’s
32 certificate issued pursuant to Article 4 (commencing with Section
33 2080) of Chapter 5 of Division 2 of the Business and Professions
34 Code, an osteopathic physician’s and surgeon’s certificate issued
35 pursuant to Article 4.5 (commencing with Section 2099.5) of
36 Chapter 5 of Division 2 of the Business and Professions Code, or
37 an individual duly licensed as a physician, surgeon, or osteopathic
38 physician or surgeon in another state or jurisdiction, who directly
39 treats or supervises the treatment of the serious health condition.

1 (B) Any other person determined by the United States Secretary
2 of Labor to be capable of providing health care services under the
3 FMLA.

4 (7) "Parent" means a biological, foster, or adoptive parent, a
5 stepparent, a legal guardian, or other person who stood in loco
6 parentis to the employee when the employee was a child.

7 (8) "Serious health condition" means an illness, injury,
8 impairment, or physical or mental condition that involves either
9 of the following:

10 (A) Inpatient care in a hospital, hospice, or residential health
11 care facility.

12 (B) Continuing treatment or continuing supervision by a health
13 care provider.

14 (d) An employer shall not be required to pay an employee for
15 any leave taken pursuant to subdivision (a), except as required by
16 subdivision (e).

17 (e) An employee taking a leave permitted by subdivision (a)
18 may elect, or an employer may require the employee, to substitute,
19 for leave allowed under subdivision (a), any of the employee's
20 accrued vacation leave or other accrued time off during this period
21 or any other paid or unpaid time off negotiated with the employer.
22 If an employee takes a leave because of the employee's own serious
23 health condition, the employee may also elect, or the employer
24 may also require the employee, to substitute accrued sick leave
25 during the period of the leave. However, an employee shall not
26 use sick leave during a period of leave in connection with the birth,
27 adoption, or foster care of a child, or to care for a child, parent, or
28 spouse with a serious health condition, unless mutually agreed to
29 by the employer and the employee.

30 (f) (1) During any period that an eligible employee takes leave
31 pursuant to subdivision (a) or takes leave that qualifies as leave
32 taken under the FMLA, the employer shall maintain and pay for
33 coverage under a "group health plan," as defined in Section
34 5000(b)(1) of the Internal Revenue Code, for the duration of the
35 leave, not to exceed 12 workweeks in a 12-month period,
36 commencing on the date leave taken under the FMLA commences,
37 at the level and under the conditions coverage would have been
38 provided if the employee had continued in employment
39 continuously for the duration of the leave. Nothing in the preceding
40 sentence shall preclude an employer from maintaining and paying

1 for coverage under a “group health plan” beyond 12 workweeks.
2 An employer may recover the premium that the employer paid as
3 required by this subdivision for maintaining coverage for the
4 employee under the group health plan if both of the following
5 conditions occur:

6 (A) The employee fails to return from leave after the period of
7 leave to which the employee is entitled has expired.

8 (B) The employee’s failure to return from leave is for a reason
9 other than the continuation, recurrence, or onset of a serious health
10 condition that entitles the employee to leave under subdivision (a)
11 or other circumstances beyond the control of the employee.

12 (2) Any employee taking leave pursuant to subdivision (a) shall
13 continue to be entitled to participate in employee health plans for
14 any period during which coverage is not provided by the employer
15 under paragraph (1), employee benefit plans, including life,
16 short-term, or long-term disability or accident insurance, pension
17 and retirement plans, and supplemental unemployment benefit
18 plans to the same extent and under the same conditions as apply
19 to an unpaid leave taken for any purpose other than those described
20 in subdivision (a). In the absence of these conditions an employee
21 shall continue to be entitled to participate in these plans and, in
22 the case of health and welfare employee benefit plans, including
23 life, short-term, or long-term disability or accident insurance, or
24 other similar plans, the employer may, at his or her discretion,
25 require the employee to pay premiums, at the group rate, during
26 the period of leave not covered by any accrued vacation leave, or
27 other accrued time off, or any other paid or unpaid time off
28 negotiated with the employer, as a condition of continued coverage
29 during the leave period. However, the nonpayment of premiums
30 by an employee shall not constitute a break in service, for purposes
31 of longevity, seniority under any collective bargaining agreement,
32 or any employee benefit plan.

33 For purposes of pension and retirement plans, an employer shall
34 not be required to make plan payments for an employee during
35 the leave period, and the leave period shall not be required to be
36 counted for purposes of time accrued under the plan. However, an
37 employee covered by a pension plan may continue to make
38 contributions in accordance with the terms of the plan during the
39 period of the leave.

1 (g) During a family care and medical leave period, the employee
2 shall retain employee status with the employer, and the leave shall
3 not constitute a break in service, for purposes of longevity, seniority
4 under any collective bargaining agreement, or any employee benefit
5 plan. An employee returning from leave shall return with no less
6 seniority than the employee had when the leave commenced, for
7 purposes of layoff, recall, promotion, job assignment, and
8 seniority-related benefits such as vacation.

9 (h) If the employee's need for a leave pursuant to this section
10 is foreseeable, the employee shall provide the employer with
11 reasonable advance notice of the need for the leave.

12 (i) If the employee's need for leave pursuant to this section is
13 foreseeable due to a planned medical treatment or supervision, the
14 employee shall make a reasonable effort to schedule the treatment
15 or supervision to avoid disruption to the operations of the employer,
16 subject to the approval of the health care provider of the individual
17 requiring the treatment or supervision.

18 (j) (1) An employer may require that an employee's request
19 for leave to care for a child, a spouse, or a parent who has a serious
20 health condition be supported by a certification issued by the health
21 care provider of the individual requiring care. That certification
22 shall be sufficient if it includes all of the following:

23 (A) The date on which the serious health condition commenced.

24 (B) The probable duration of the condition.

25 (C) An estimate of the amount of time that the health care
26 provider believes the employee needs to care for the individual
27 requiring the care.

28 (D) A statement that the serious health condition warrants the
29 participation of a family member to provide care during a period
30 of the treatment or supervision of the individual requiring care.

31 (2) Upon expiration of the time estimated by the health care
32 provider in subparagraph (C) of paragraph (1), the employer may
33 require the employee to obtain recertification, in accordance with
34 the procedure provided in paragraph (1), if additional leave is
35 required.

36 (k) (1) An employer may require that an employee's request
37 for leave because of the employee's own serious health condition
38 be supported by a certification issued by his or her health care
39 provider. That certification shall be sufficient if it includes all of
40 the following:

1 (A) The date on which the serious health condition commenced.

2 (B) The probable duration of the condition.

3 (C) A statement that, due to the serious health condition, the
4 employee is unable to perform the function of his or her position.

5 (2) The employer may require that the employee obtain
6 subsequent recertification regarding the employee's serious health
7 condition on a reasonable basis, in accordance with the procedure
8 provided in paragraph (1), if additional leave is required.

9 (3) (A) In any case in which the employer has reason to doubt
10 the validity of the certification provided pursuant to this section,
11 the employer may require, at the employer's expense, that the
12 employee obtain the opinion of a second health care provider,
13 designated or approved by the employer, concerning any
14 information certified under paragraph (1).

15 (B) The health care provider designated or approved under
16 subparagraph (A) shall not be employed on a regular basis by the
17 employer.

18 (C) In any case in which the second opinion described in
19 subparagraph (A) differs from the opinion in the original
20 certification, the employer may require, at the employer's expense,
21 that the employee obtain the opinion of a third health care provider,
22 designated or approved jointly by the employer and the employee,
23 concerning the information certified under paragraph (1).

24 (D) The opinion of the third health care provider concerning
25 the information certified under paragraph (1) shall be considered
26 to be final and shall be binding on the employer and the employee.

27 (4) As a condition of an employee's return from leave taken
28 because of the employee's own serious health condition, the
29 employer may have a uniformly applied practice or policy that
30 requires the employee to obtain certification from his or her health
31 care provider that the employee is able to resume work. Nothing
32 in this paragraph shall supersede a valid collective bargaining
33 agreement that governs the return to work of that employee.

34 (I) It shall be an unlawful employment practice for an employer
35 to refuse to hire, or to discharge, fine, suspend, expel, or
36 discriminate against, any individual because of any of the
37 following:

38 (1) An individual's exercise of the right to family care and
39 medical leave provided by subdivision (a).

1 (2) An individual's giving information or testimony as to his or
2 her own family care and medical leave, or another person's family
3 care and medical leave, in any inquiry or proceeding related to
4 rights guaranteed under this section.

5 (m) This section shall not be construed to require any changes
6 in existing collective bargaining agreements during the life of the
7 contract, or until January 1, 1993, whichever occurs first.

8 (n) The amendments made to this section by Chapter 827 of the
9 Statutes of 1993 shall not be construed to require any changes in
10 existing collective bargaining agreements during the life of the
11 contract, or until February 5, 1994, whichever occurs first.

12 (o) This section shall be construed as separate and distinct from
13 Section 12945.

14 (p) Leave provided for pursuant to this section may be taken in
15 one or more periods. The 12-month period during which 12
16 workweeks of leave may be taken under this section shall run
17 concurrently with the 12-month period under the FMLA, and shall
18 commence the date leave taken under the FMLA commences.

19 (q) In any case in which both parents entitled to leave under
20 subdivision (a) are employed by the same employer, the employer
21 shall not be required to grant leave in connection with the birth,
22 adoption, or foster care of a child that would allow the parents
23 family care and medical leave totaling more than the amount
24 specified in subdivision (a).

25 (r) (1) Notwithstanding subdivision (a), an employer may refuse
26 to reinstate an employee returning from leave to the same or a
27 comparable position if all of the following apply:

28 (A) The employee is a salaried employee who is among the
29 highest paid 10 percent of the employer's employees who are
30 employed within 75 miles of the worksite at which that employee
31 is employed.

32 (B) The refusal is necessary to prevent substantial and grievous
33 economic injury to the operations of the employer.

34 (C) The employer notifies the employee of the intent to refuse
35 reinstatement at the time the employer determines the refusal is
36 necessary under subparagraph (B).

37 (2) In any case in which the leave has already commenced, the
38 employer shall give the employee a reasonable opportunity to
39 return to work following the notice prescribed by subparagraph
40 (C).

1 (s) Leave taken by an employee pursuant to this section shall
2 run concurrently with leave taken pursuant to the FMLA, except
3 for any leave taken under the FMLA for disability on account of
4 pregnancy, childbirth, or related medical conditions. The aggregate
5 amount of leave taken under this section or the FMLA, or both,
6 except for leave taken for disability on account of pregnancy,
7 childbirth, or related medical conditions, shall not exceed 12
8 workweeks in a 12-month period. An employee is entitled to take,
9 in addition to the leave provided for under this section and the
10 FMLA, the leave provided for in Section 12945, if the employee
11 is otherwise qualified for that leave.

12 *SEC. 3. The amendments made by this act do not constitute*
13 *changes in, but are declaratory of, existing law.*